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Supreme Court of the United States

OCTOBER TERM, 1955

No. 267

THOMAS WALTER POMORSKI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

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Supreme Court of the United States

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No.

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v.

UNITED STATES OF AMERICA,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Western District of Michigan, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is reported. (*Pomorski* v. *United States,* 222 F. 2d 106) It is printed as

Appendix A to this petition (page 7). The opinion of the District Court is reported. (125 F. Supp. 68)

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1955. (See Appendix B to this petition, page 10, *infra.*) A petition for rehearing was filed and denied on July 15, 1955. (See Appendix C to this petition, page 11, *infra.*) The time for filing this petition for writ of certiorari expires August 14, 1955. This petition for writ of certiorari is filed within the time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). (See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether the court below committed reversible error when it held that because Pomorski answered in the draft board forms that he was a conscientious objector he was estopped from challenging the constitutionality of the act and the regulations.

II.

Whether Sections 1660.1 and 1660.20 of the Selective Service Regulations and the local board's order for Pomorski to perform civilian work at the Northville State Hospital, issued pursuant to such sections, are not authorized by the Universal Military Training and Service Act and are in conflict therewith because the work is private and not public and is not "national" or "federal" as required by the act.

III.

Whether the order to perform civilian work at the Northville State Hospital constitutes a construction and an application of the Universal Military Training and Service Act and the regulations that bring them into conflict with the provisions of the Thirteenth Amendment to the United States Constitution because the work is private and not public and is not of "national" or "federal" nature and does not contribute to the "national" welfare.

IV.

Whether the order to do civilian work in the Northville State Hospital constitutes a construction and application of the act and regulations that bring them into conflict with the provisions of the Fifth Amendment to the United States Constitution because petitioner is being restrained of his liberty without due process of law.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) is involved. Also, Section 6(j) of the act must be considered (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86). See also Section 12(a) of the act (50 U. S. C. App. § 462(a)).

Section 1660.1 and Section 1660.20 of the regulations (32 C. F. R. §§ 1660.1 and 1660.20) are involved. These are extensive provisions which are printed as Appendix D, *infra*, page 11.

STATEMENT OF THE CASE

Petitioner was indicted for failure to comply with an order of his local board directing him to do civilian work contributing to the maintenance of the national health, safety and interest at the Northville State Hospital. [App.

2, 3, 4][1] He pleaded not guilty. [App. 1] He waived trial by jury. [App. 1-4] At his trial at the close of all of the evidence he filed a motion for judgment of acquittal. [App. 1, 40-41] The motion was denied. The trial court rendered an opinion. [App. 42-51; 125 F. Supp. 68] Petitioner was sentenced to the custody of the Attorney General for a period of five years. [App. 1, 72-73] The case was duly appealed to the Court of Appeals. [App. 73]

The petitioner was classified as a conscientious objector by both his local board and the appeal board. [App. 55, 56] He was ordered to report to do civilian work at the Northville State Hospital, Northville, Michigan. [App. 70] He did not report at the hospital to do the civilian work. [App. 71]

REASONS FOR GRANTING THE WRIT

I.

The court below, as a basis for its holding, in its opinion states that petitioner requested to be classified as a conscientious objector. (See Appendix A, pages 8-9, *infra.*) It is said that because he said he was a conscientious objector petitioner is estopped from challenging the constitutionality of the act and the regulation as enforced by the order of the local board.

This holding is erroneous because the making of the conscientious objector claim was not optional but was mandatory. The petitioner was bound by the law to answer truthfully all questions appearing in the questionnaire mailed to him by the draft board. He showed he was a conscientious objector. Had he answered otherwise he would have been guilty of perjury and would have violated the act. His answer in the questionnaire compelled the board to send to him the conscientious objector form calling for additional answers. He had to answer truthfully the

[1] Figures appearing herein within brackets refer to the pages of the printed appendix to appellant's brief filed in the court below.

questions in that form. Answering the questions in the forms was compelled by law. He had no other alternative.

The unfairness of this holding of the Court can be demonstrated by an analogy. Suppose the questionnaire asked the registrant if he were red-headed. Assume that the registrant truthfully answered that he was red-headed. Now if the law made a red-headed man liable for civilian work it is clear that because he answered the truth he would not be estopped from challenging the validity of the work order, because he had no alternative but to answer that he was red-headed. So it is here. There was no voluntary waiver of the right to challenge the constitutionality of the law by exercising an option. There was no option for appellant to elect under the law.

When the court held that the petitioner was estopped from asserting the invalidity of the law because he showed he was a conscientious objector it made a holding that directly conflicts with the holding of this court in *Power Manufacturing Company* v. *Saunders,* 274 U. S. 490, 496-497.

There is a conflict between the holding by the court below and the decision of this Court on this point. In the event the Court fails to find a conflict it is submitted that there is involved here an important question of federal law that has not been determined but that ought to be determined by this Court.

II.

The other grounds relied upon for the granting of the writ in this case have been thoroughly discussed in the petition for writ of certiorari in the case of *Armand Fred Hoepker* v. *United States,* a companion petition for writ of certiorari filed successively with this case. The Court is here referred to the discussion that appears in the petition for writ of certiorari in that case at pages 4 to 12.

CONCLUSION

For the reasons above stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

July, 1955.

APPENDIX A

OPINION OF COURT BELOW

No. 12337

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS WALTER POMORSKI,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Western District of Michigan, Southern Division.

Decided April 28, 1955.

Before SIMONS, Chief Judge, McALLISTER and STEWART, Circuit Judges.

PER CURIAM. Appellant, classified under the Universal Military Training and Service Act (50 U. S. C. App. Sections 451-470) in Class I-O as a conscientious objector, was convicted in the district court of violating the Act in failing to report for work at the Northville State Hospital in Michigan as ordered by his local draft board. Section 456(j) of the Act provides in part that if a conscientious objector is found to be conscientiously opposed to participation in noncombatant service with the Armed Forces, he shall, in lieu of induction into the Armed Forces "be ordered by his local board, subject to such regulations as the president may prescribe, to perform for a period equal

to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . ."

Section 1660.1 of the Selective Service Regulations, promulgated by Presidential Executive Order, lists the types of employment which may be considered as appropriate to be performed under the foregoing statutory provision as "civilian work contributing to the maintenance of the national health, safety, or interest." It includes "employment by the United States Government, or by a State, Territory or Possession of the United States, or by a political subdivision thereof, or by the District of Columbia."

Appellant argues that the order to perform work in a *state* institution, and the regulations permitting such an order, are in conflict with the statute because such work does not contribute to the "*national* health, safety, or interest." He alternatively argues that if the statute be interpreted to permit the local board to order him to perform civilian services for a state institution, it violates the Thirteenth and Fifth Amendments to the Constitution.

The record shows that the Northville State Hospital is a mental hospital, caring for members of the public in need of its services, including veterans whose cost of hospitalization is in part defrayed by the national government through the Veterans Administration.

We think the appellant's contentions are without merit. The care and restoration of those in impaired mental health, whether carried on by a local, state or national institution, obviously contributes to the national interest. The regulations and order are thus clearly within the language of the statute. Moreover, the statute as so interpreted is clearly Constitutional. It is not the Constitutional but Congressional policy which relieves the conscientious objector from the duty of bearing arms. *United States* v. *Macintosh*, 283 U. S. 605, 623, 624 (1931). The

appellant, at his own request, was so classified as to be accorded the privilege of civilian work in lieu of the duty to enter the Armed Forces. There can be no Constitutional challenge of the validity of an Act which gave appellant conditional exemption from a service which he could Constitutionally be compelled to perform. *Roodenko* v. *United States*, 147 F. (2d) 752 (10 Cir., 1944), cert. den. 324 U. S. 860 (1945). See *United States* v. *Niles*, 122 F. Supp. 382 (N. D. Cal., 1954); *United States* v. *Smith*, 124 F. Supp. 406 (E. D. Ill., 1954).

The judgment of the district court is affirmed.

APPENDIX B

Judgment of Court Below

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Thomas Walter Pomorski, Appellant, v. United States of America, Appellee.	Appeal from the District Court of the United States for the Western District of Michigan, Southern Division.

Filed April 28, 1955.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Michigan, Southern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS WALTER POMORSKI,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Filed July 15, 1955.

The petition for rehearing is hereby denied. Approved for entry:

[signed]
United States Circuit Judge

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Act

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed

forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the act (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and

service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the act (50 U. S. C. App. § 462 (a), 62 Stat. 622) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1660.1 of the Regulations

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1 (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952)) provides:

"*Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity

or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

"(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Regulations

Section 1660.20 of the Selective Service Regulations (32 C. F. R. § 1660.20 (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952)) provides:

"*Determination of Type of Civilian Work to Be Performed and Order by the Local Board to Perform Such Work.*—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit

to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Se-

lective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

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CITATIONS

Case:

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Statute:

Universal Military Training and Service Act, 62 Stat. 604, Section 6(j) 2

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 267

THOMAS WALTER POMORSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 7-9) is reported at 222 F. 2d 106. The opinion of the district court (R. 42-51) is reported at 125 F. Supp. 68.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1955 (Pet. 10). A petition for rehearing was denied July 15, 1955 (Pet. 11). The petition for a writ of certiorari was filed July 26,

1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 6(j) of the Universal Military Training and Service Act, a conscientious objector could validly be assigned to perform civilian work at a state hospital.

STATEMENT

The case presents the same issues as those which are raised by the petitioners in No. 266, this Term, who were assigned to state institutions, and which were raised in the petition for certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Niles* v. *United States,* 220 F. 2d 278, certiorari denied, 349 U.S. 939.

Like the petitioners in those cases, petitioner here was classified I-O, i.e., conscientious objector (R. 55). He failed to submit to the local board a statement as to the type of civilian work he wished to perform and failed to make a choice among three specific employments in hospitals offered to him (R. 57). At a meeting with the local board, petitioner stated that he would not accept an assignment because he would not be free to resign (R. 60-62). Thereafter he was ordered to report for employment at the Northville State Hospital in Michigan (R. 70), but failed to do so (R. 71).

He was convicted of willfully refusing to report for civilian work and was sentenced to imprisonment for five years (R. 72-73). On appeal, the judgment was affirmed (Pet. 10).

ARGUMENT

Petitioner's attack on the validity of his assignment to a state hospital is discussed in the government's brief in opposition in No. 266, this Term and was discussed in the brief in opposition in the *Niles* case, No. 719, O.T. 1954.

The only additional point which petitioner raises (Pet. 4-5) relates to his misinterpretation of the opinion below as it dealt with the constitutionality of the statute as interpreted by the regulation. The court said (Pet. 8-9):

> It is not the Constitutional but Congressional policy which relieves the conscientious objector from the duty of bearing arms. * * * The appellant, at his own request, was so classified as to be accorded the privilege of civilian work in lieu of the duty to enter the Armed Forces. There can be no Constitutional challenge of the validity of an Act which gave appellant conditional exemption from a service which he could Constitutionally be compelled to perform.

This is manifestly not a holding that petitioner is estopped to challenge the constitutionality of the act and regulations because he requested that he be classified as a conscientious objector. The court was pointing out, in response to the contention that the Act as interpreted violated the Fifth and Thirteenth Amendments, that Congress, as a matter of grace and not of right, gave special privileges to conscientious objectors, and that, since the condi-

tion it attached to such privilege was a reasonable one, the condition did not violate the Amendments.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST, 1955.

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